

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**LONNIE YOUNG**

**APPELLANT**

**VS.**

**NO. 2010-KA-0240**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: LA DONNA C. HOLLAND  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS .....	2
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
I.    YOUNG WAS NOT ENTITLED TO IMPEACH HIS OWN WITNESS WITH AN ALLEGEDLY INCONSISTENT PRIOR STATEMENT BECAUSE DEFENSE COUNSEL DID NOT CLAIM TO BE SURPRISED BY THE WITNESS'S TRIAL TESTIMONY AND BECAUSE THERE WAS NO FACTUAL CONTRADICTION BETWEEN THE WITNESS'S PRIOR STATEMENT AND TRIAL TESTIMONY. ....	4
II.   THE TRIAL COURT PROPERLY DENIED YOUNG'S IMPERFECT SELF-DEFENSE INSTRUCTION FOR LACK OF EVIDENTIARY FOUNDATION .....	8
CONCLUSION .....	11
CERTIFICATE OF SERVICE .....	12

## TABLE OF AUTHORITIES

### STATE CASES

<b>Brown v. State, 890 So. 2d 901, 914 (Miss. 2004)</b> .....	<b>4, 5</b>
<b>Cook v. State, 467 So. 2d 203, 207, 208 (Miss. 1985)</b> .....	<b>8, 9</b>
<b>Everett v. State, 835 So.2d 118, 120 -123 (Miss. Ct. App. 2003)</b> .....	<b>6</b>
<b>King v. State, 994 So. 2d 890, 897 (Miss. Ct. App. 2008)</b> .....	<b>5, 6</b>
<b>Livingston v. State, 943 So.2d 66, 71 (Miss. Ct. App. 2006)</b> .....	<b>8</b>
<b>McKlemurry v. State, 947 So.2d 987, 990 (Miss. Ct. App. 2006)</b> .....	<b>8</b>
<b>Wade v. State, 748 So.2d 771, 775 (miss. 1999)</b> .....	<b>8</b>

### STATE STATUTES

<b>Miss. Code Ann. § 97-3-15(f)</b> .....	<b>9, 10</b>
---	--------------

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**LONNIE YOUNG**

**APPELLANT**

**VS.**

**NO. 2010-KA-0240**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF ISSUES**

- I. YOUNG WAS NOT ENTITLED TO IMPEACH HIS OWN WITNESS WITH AN ALLEGEDLY INCONSISTENT PRIOR STATEMENT BECAUSE DEFENSE COUNSEL DID NOT CLAIM TO BE SURPRISED BY THE WITNESS'S TRIAL TESTIMONY AND BECAUSE THERE WAS NO FACTUAL CONTRADICTION BETWEEN THE WITNESS'S PRIOR STATEMENT AND TRIAL TESTIMONY.
- II. THE TRIAL COURT PROPERLY DENIED YOUNG'S IMPERFECT SELF-DEFENSE INSTRUCTION FOR LACK OF EVIDENTIARY FOUNDATION.

## STATEMENT OF FACTS

At the time of Lonnie Young's trial, he and DeWanda Young had been married for ten years. T. 252. However, they have been romantically involved for much longer, as evidenced by the fact that their three children range in age from eleven to thirty. T. 252. Dewanda also has a nineteen-year-old daughter, Shakitay Harris, who was fathered by Otis Lee Morgan. T. 235.

On July 4, 2008, DeWanda's mother, Rosetta Russell, had a social gathering at her home, which is located on the street behind Young and DeWanda's home. DeWanda attended the party. So did Morgan. When Young discovered that Morgan was at the party, he armed himself and walked to Ms. Russell's house to confront Morgan. T. 265-66. What happened when Young confronted Russell was disputed at trial. Three eyewitness testified that Young approached Russell and stated, "You just going to come over here and disrespect me and f---ing my wife," before shooting him to death. T. 93-97, 160-61, 180. These same eyewitnesses testified that the victim was holding two empty ice bags in his hands, had no weapon in his hands, and was not reaching for a weapon prior to being shot. T. 104, 152, 160, 162, 180, 187. Young, on the other hand, testified that when he asked the victim why he was disrespecting him and "screwing" his wife, the victim turned and said, "F--- you," and pulled a gun on Young, which prompted Young to shoot Russell and flee the scene. T. 256-57.

Young was found guilty of Russell's murder by a Wayne County Circuit Court jury.

## **SUMMARY OF ARGUMENT**

Young was not entitled to impeach his own witness because the witness was not declared a hostile witness, the record does not show that defense counsel was surprised by the witness's testimony, and because there was no factual contradiction between the witness's prior statement and her trial testimony.

Young was not entitled to an imperfect self-defense instruction because there was absolutely no evidence in the record to show that he shot the victim without malice due to a bona fide but unfounded belief that it was necessary to prevent death or great bodily harm. Although a defendant's own unsupported, self-serving testimony can provide the evidentiary basis for the granting of an instruction on the defendant's theory of the case, Young's testimony in the present case was that he saw the victim pull a gun and only fired in response to that threat. Such testimony provides an evidentiary basis for an instruction on "perfect self-defense," which Young received, not imperfect self-defense.

## ARGUMENT

### I. YOUNG WAS NOT ENTITLED TO IMPEACH HIS OWN WITNESS WITH AN ALLEGEDLY INCONSISTENT PRIOR STATEMENT BECAUSE DEFENSE COUNSEL DID NOT CLAIM TO BE SURPRISED BY THE WITNESS'S TRIAL TESTIMONY AND BECAUSE THERE WAS NO FACTUAL CONTRADICTION BETWEEN THE WITNESS'S PRIOR STATEMENT AND TRIAL TESTIMONY.

The admission or exclusion of evidence is within the sound discretion of the trial court and cannot be the basis of reversal unless a substantial right belonging to the defendant is violated by the ruling. *Brown v. State*, 890 So. 2d 901, 914 (¶39) (Miss. 2004).

Defense witness Shakitay Harris testified on direct that immediately before the shooting, only Young had a gun, and that she only saw the victim's gun lying on the ground after he was shot and fell to the ground. T. 237. Defense counsel then asked Shakitay if she remembered giving a statement to police and whether she said in that statement "that you saw your dad with a gun in his hand at all." T. 237. The State objected to defense counsel's attempt to impeach his own witness, and an off-the-record bench conference ensued. The following exchange then occurred between defense counsel and Shakitay.

Q. Ms. Harris, you recall I came to your grandmother's house and met with you and your family?

A. (nods head affirmatively)

Q. And I asked you questions about this case?

A. (nods head affirmatively)

Q. You have to verbally answer for the jury.

A. Oh, yes, sir.

Q. And at that time, I was questioning you about whether you told police if Mr. Young – I mean, Mr. Morgan, you saw him with a gun. You recall that?

A. Yes, sir.

Q. And at that time, did you not say that you saw your dad with a gun in his hand?

A. It was after he fell. Like, he was on the ground; that's when I saw the gun.

Q. Okay. You did not recall telling me, when I was questioning you at that time, that the gun was in your dad's hand when you came to the door?

A. No, sir. I was talking about Lonnie. I call both of them my dads.

Q. Okay. Fair enough. In that questioning, that statement, you did say – you said Lonnie came up and you went and said: My daddy.

A. "My daddy," that's Lonnie. I call both of them my daddy. Both of them are my dads.

T. 238-39. Defense counsel then asked to play Exhibit 8ID for impeachment purposes because he alleged that Shakitay's statement to police was inconsistent with her trial testimony. T. 239. The trial court allowed defense counsel to play in front of the jury a portion of Shakitay's video recorded statement to police. T. 241-43. After defense counsel finished playing the portion of the taped statement he believed to be inconsistent with Shakitay's trial testimony, the State renewed its objection, arguing that the portion of the statement played to the jury was not inconsistent with Shakitay's trial testimony. T. 243. The trial court sustained the objection, agreeing that the video was not inconsistent with the trial testimony. T. 243. Young claims that the trial court's ruling was reversible error.

Young was not allowed to impeach his own witness for two reasons: defense counsel failed to show that he was surprised by Shakitay's trial testimony, and Shakitay's statement to police did not factually contradict her trial testimony. A party may impeach its own witness with a prior inconsistent statement only after showing that the party is surprised by the witness's trial testimony. *King v. State*, 994 So. 2d 890, 897 (¶24) (Miss. Ct. App. 2008) (citing *Hall v. State*, 250 Miss. 253, 264, 165 So.2d 345, 350 (1964)). Shakitay was never declared to be a hostile witness, nor did



defense counsel ever claim that he was surprised by Shakitay's testimony. The mere fact that her testimony was unfavorable to the defense did not render Shakitay a hostile witness, which is a requirement to the impeachment of one's own witness. *Id.* at 898-99 (¶26-27).

For the sake of argument only, even if it could be inferred from the record that defense counsel was surprised by Shakitay's testimony, Shakitay's statement to police did not factually contradict her trial testimony. Before a party may impeach any witness with a prior statement, "there must be an actual contradiction in fact between the testimony and the prior statement." *Everett v. State*, 835 So.2d 118, 120 -123 (Miss. Ct. App. 2003). The substance of the portion of the recorded statement defense counsel played in front of the jury was that shots had already been fired and the victim was on the ground by the time Shakitay made her way outside, and at that time her father had a gun.<sup>1</sup> Ex. 8ID at 0:28:25-0:29:00.<sup>2</sup> The prior statement was not inconsistent with Shakitay's trial testimony, because Shakitay maintained throughout her testimony that she only saw Morgan with a gun after he had fallen to the ground. T. 237, 249. Because no actual contradiction of fact between Shakitay's trial testimony and her prior statement to police existed, the trial court properly ruled that defense counsel could not attempt to further impeach Shakitay with the portion of the tape he had already played to the jury.

Finally, should this honorable Court in any way disagree with the State's analysis and find that defense counsel should have been allowed to impeach Shakitay with her prior statement, the error must be deemed harmless at best because the alleged inconsistent statement was played in front

---

<sup>1</sup>When the victim's brother rolled the victim's body over, a gun fell out of the victim's pocket. T. 103, 162, 165, 170.

<sup>2</sup>The record shows that this is the only portion of Shakitay's recorded statement to police that defense counsel sought to introduce and did in fact play to the jury. T. 241.

of the jury and the jury was never told to disregard the prior statement. Additionally, defense counsel argued in closing argument that it was up to the jury to decide if Shakitay was telling the truth on the witness stand or if she was telling the truth in her statement to police. T. 316-317. Accordingly, although the State maintains that the portion of the statement played to the jury did not factually contradict Shakitay's testimony, to the extent this Court may find otherwise, defense counsel did in fact attempt to impeach Shakitay with the alleged inconsistent statement. Accordingly, Young's first assignment of error must fail.

## **II. THE TRIAL COURT PROPERLY DENIED YOUNG'S IMPERFECT SELF-DEFENSE INSTRUCTION FOR LACK OF EVIDENTIARY FOUNDATION.**

Although a criminal defendant is entitled to jury instructions which present his theory of the case, the trial court may refuse instructions which incorrectly state the law, have no evidentiary basis, or are covered fairly elsewhere. *Livingston v. State*, 943 So.2d 66, 71 (¶ 14) (Miss. Ct. App. 2006). Additionally, “no reversible error will be found to exist if, when read together, the instructions correctly state the law and effectuate no injustice.” *McKlemurry v. State*, 947 So.2d 987, 990 (¶3) (Miss. Ct. App. 2006).

An intentional killing may be reduced from murder to manslaughter under the theory of imperfect self-defense where the killing is committed “without malice but under a bona fide (but unfounded) belief that it was necessary to prevent death or great bodily harm.” *Wade v. State*, 748 So.2d 771, 775 (¶ 12) (Miss. 1999). In the present case, there was no evidentiary basis to support a finding that the killing was committed without malice, nor does the record support a finding that Young had a bona fide but unfounded belief that he had to shoot Morgan so that he would not be killed or suffer great bodily harm.

Because a killing committed under the theory of imperfect self-defense is manslaughter, the killing cannot be committed with malice. *Cook v. State*, 467 So. 2d 203, 207, 208 (Miss. 1985). There is no evidentiary foundation to support a finding that Young shot Morgan without malice. According to Young's own testimony, he never carried a gun, only kept one in his closet. T. 263. Yet when Young discovered that Morgan was at his mother-in-law's home, Young armed himself and proceeded to Ms. Russell's home with the intention of confronting and provoking Morgan. T. 267.

Additionally, there is no evidentiary foundation to show that Young acted under a bona fide

but unfounded belief that it was necessary shoot Morgan in order to prevent death or great bodily harm. The Mississippi Supreme Court has best explained imperfect self-defense by contrasting it with self-defense. In *Cook v. State*, the court explained that perfect self-defense is based on the justifiable homicide statute, while imperfect self-defense is based on the heat of passion manslaughter statute. 467 So. 2d 203, 207 (Miss. 1985) (citing Miss. Code Ann. § 97-3-15(f); Miss. Code Ann. § 97-3-35). A claim of perfect self-defense requires a defendant who faces imminent danger to have an objectively reasonable apprehension of death or great bodily before the killing will be justified. *Id.*; Miss. Code Ann. § 97-3-15(f). A defendant claiming imperfect self-defense does not have to face imminent danger, and need only have a subjectively reasonable apprehension of death or great bodily harm before a killing will be reduced to manslaughter. *Id.* In other words, it is the defendant's subjective belief that will provide the basis for an imperfect self-defense instruction. Young's own testimony, an allegation that the victim pulled a gun first, provided the necessary evidentiary foundation for a self-defense instruction, which Young received. C.P. 69. That is, Young's testimony, taken as true, showed that he faced imminent danger and his apprehension was objectively reasonable. That same testimony, that the victim allegedly pulled a gun on Young, cannot provide an evidentiary basis for the bona fide but unfounded belief required for an imperfect self-defense instruction. In other words, had the victim actually pulled a gun, Young's belief that it was necessary to shoot the victim was not unfounded. Young was adamant that he shot the victim for only one reason; he saw Young pull a gun. T. 281-83. As such, Young's testimony only provided an evidentiary basis for self-defense, not imperfect self-defense.

Young claims that *Smith v. State*, 20 So.3d 12 (Miss. Ct. App. 2009), stands for the proposition that the trial court erred in refusing his imperfect self-defense instruction. However, *Smith* is easily distinguishable from the facts of the present case. In *Smith*, just days before the

victim's murder, the victim verbally threatened Smith's life and hit him with a pistol. *Id.* at 13 (¶4). At the fatal encounter (days) later, Smith testified that he saw the victim reach for something, so Smith shot him. *Id.* at 14 (¶6). Unlike Young, Smith never claimed that he actually saw the victim pull a gun. Accordingly, because Smith only thought, but mistakenly so, that the victim had a gun, he received an imperfect self-defense instruction because of his bona fide but unfounded belief that it was necessary to shoot in order to prevent death or great bodily harm. However, presumably because Smith never claimed that he saw a gun, he did not receive a perfect self-defense instruction. *Id.* at (¶7). Accordingly, *Smith* lends no credence to Young's argument because Young claimed that he did see the victim pull a gun, which is why he was entitled to a perfect self-defense instruction, but not an imperfect self-defense instruction.

For the foregoing reasons, there was no evidentiary basis to support the granting of an imperfect self-defense instruction because even Young's own testimony failed to provide even a shred of evidence that he acted without malice but under a bona fide yet unfounded belief that it was necessary to shoot Morgan in order prevent death or great bodily harm. Accordingly, the trial court properly refused Young's proffered imperfect self-defense instruction.


## CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Young's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

  
LA DONNA C. HOLLAND  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680

## CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert Walter Bailey  
Circuit Court Judge  
Post Office Box 1167  
Meridian, MS 39302

Honorable Bilbo Mitchell  
District Attorney  
Post Office Box 848  
Meridian, MS 39302

Aafram Y, Sellers, Esquire  
Brice R. White, Esquire  
Post Office Box 1062  
Jackson, MS 39215-1062

This the 6th day of December, 2010.

  
\_\_\_\_\_  
LA DONNA C. HOLLAND  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205-0220  
TELEPHONE: (601) 359-368